In the United States

Circuit Court of Appeals

for the Ninth Circuit

GEORGE SHALLAS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 5918.

PETITION FOR REHEARING

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GREEN-BERRY-HUGHES PTG CO.

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Comes now the appellant and petitions the court for a rehearing herein upon the following grounds:

I.

The Court decided this case solely upon the appellee's motion to strike the bill of exceptions for the reason that it was not settled or allowed within the term at which the judgment was entered. We respectfully submit that the opinion itself shows on its face that in deciding this question the Court wholly overlooked the fact that a motion for a new trial was interposed, argued and taken under advisement by the trial court, and that a decision was not reached by the trial judge, nor was an order entered on this motion, until after the May term had been adjourned.

The opinion by Judge Rudkin does not mention the motion for a new trial, but merely sets out the date of the judgment, the date of the adjournment sine die of the May term and the fact that the bill of exceptions was not presented or allowed until after the term had expired and the court had lost jurisdiction to act in the matter. Unquestionably the Supreme Court has held in the cases cited in the opinion that under such a state of facts the court would have no jurisdiction to settle or allow the bill of exceptions. But we most earnestly urge that that is not the question involved in this case, and that the opinion does not state all the facts in this regard and shows no reason at all why after judgment was entered on June 5, 1929, no order was presented extending the time to serve and file the bill of exceptions till July 27, 1929.

The questions to be decided in this case in regard to the motion to strike the bill of exceptions are these:

(1) Did the fact that a motion for a new trial was made and filed and argued on the day judgment was entered, and on said day taken under advisement by the court, continue jurisdiction of the case in the court, even though the term of court was adjourned before the motion was decided; and (2) did the filing of the motion for a new trial stay the running of the time within which to file a bill of exceptions?

In neither of the Supreme Court cases cited in the opinion of this court, (O'Connel v. U. S. 253 U. S. 142, and Exporters v. Butterworth-Judson Co., 258 U. S. 365), are these questions discussed or decided. In both cases the term in which the judgment was entered expired before the bill of exceptions was served and settled, or the time within which to so settle the bill extended, but in neither case was there a motion for a new trial pending and undecided when the term ended.

There is, on the other hand, a large number of cases from a majority of the Circuit Courts of Appeal holding that the time in which to file a bill of exceptions does not begin to run until a motion for a new trial, presented within time and within the term, is disposed of.

In Woods v. Lindvall, 48 Fed. 73 (8th Cir.), the judgment was entered at the January, 1891, term

and a motion for a new trial was filed at that term, but the January term adjourned sine die before the motion was heard or determined. At the succeeding term, the petition for a new trial was argued and overruled, and the bill of exceptions was signed, sealed and filed, and objection was made to the allowance of the bill because the trial term had expired, and the court said:

> "We are all agreed that the motion to strike out the bill of exceptions should be overruled. It is true that in several cases cited by counsel for defendant in error, to-wit, Walton v. U. S., 9 Wheat. 651; Ex parte Bradstreet, 4 Pet. 102, and Muller v. Ehlers, 91 U. S. 249,—it was held in effect that, in the absence of an order of court extending the time, a bill of exceptions covering errors committed at the trial cannot be allowed and filed (unless by consent of parties) after the term has expired at which the judgment was rendered. But in none of these cases did the question arise whether a bill of exceptions may not be allowed and filed at the term when the motion for a new trial is finally acted on, even though such action is taken at a term subsequent to the entry of judgment; and that is the precise question which confornts us in the case at bar. The authorities cited are either cases in which no motion for a new trial was filed, or in which the bill of exceptions was presented after the lapse of the term in which the motion for a new trial was overruled. According to well-established principles, therefore, the judgments involved had become final at a term preceding that at which a bill of exceptions was tendered. Since the decision in Rutherford v. Insurance Co., 1 Fed. Rep. 456, we believe the practice has been uniform in all the districts of this cir-

cuit, where the custom prevails of entering judgment immediately on the rendition of the verdict, to allow a bill of exceptions during the term at which the motion for a new trial is overruled, even though it happens to be a term subsequent to the entry of judgment. This practice, according to our observation, has become so common that it may be termed a rule of procedure in this circuit. It is a convenient practice. It obviates the necessity of settling a bill of exceptions at the trial term, which is useless labor if a motion for a new trial is continued to and is sustained at the succeeding term. And in these days, when it is customary to take notes of trial proceedings in shorthand, the practice in question is not open to those objections formerly urged against it. We are of the opinion, therefore, that the practice which has hitherto obtained in many districts of the circuit should be upheld unless it is overborne by controlling authority, and we find no such authority. On the contrary, we think the rule requiring bills of exception to be filed at the term when judgment is rendered must be understood to mean the term when the judgment becomes final, and by reason of its becoming final the court loses control of the record. It has been held several times that, if a motion for a new trial is duly filed by leave at the trial term, the judgment does not become final until such motion is determined. Rutherford v. Insurance Co., supra; Brown v. Evans, 8 Sawy. 502, 17 Fed. Rep. 912; Railway Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. Rep. 497; Brockett v. Brockett, 2 How. 238; Memphis v. Brown, 94 U. S. 716, 717; Slaughter-House Cases, 10 Wall. 289. In some of the state courts, also, the precise question of practice now before us has been determined adversely to the defendant in error. Thus, under a statute of the state of Missouri requiring all exceptions to be filed

during the term at which they were taken, and all exceptions during the trial of a cause to be embraced in one bill, it has been held that the continuance of a motion for a new trial from the trial term to a succeeding term keeps the record open, prevents the judgment from becoming final, and enables the court to allow a bill of exceptions during the term at which the motion is finally determined. Riddlesbarger v. McDaniel, 38 Mo. 138; Henze v. Railroad Co. 71 Mo. 636, 644. See, also, Bank v. Steinmitz, 65 Cal. 219, 3 Pac. Rep. 808. We hold, therefore, that the bill of exceptions in the present case was properly allowed and filed, and we accordingly overrule the motion to expunge it from the record."

In Merchant's Insurance Co. v. Buchner, 98 Fed. 222, the Sixth Circuit arrived at the same conclusion and said:

"1. A preliminary question is made by the defendant in error as to the allowance of the bill of exceptions. It appears that a judgment of $3,500 in favor of Buckner & Co. was rendered on January 28, 1898. On the same day, plaintiff in error filed a motion for a new trial, and in reference thereto the following order was made by the court:

" 'This day came again the parties, and defendant filed a motion for a new trial herein; and it is ordered that execution do not issue upon the judgment in this case until the further order of this court, and, on motion of defendant, it is allowed sixty days in which to tender and file a bill of exceptions herein.'

"The motion for a new trial was not disposed of until the following June term of the court. On the 9th day of June the court, having considered the motion of the defendant for

a new trial, found the verdict of the jury in favor of the plaintiffs to be excessive, and ordered that a new trial be granted unless the plaintiffs, by a proper writing, remit $1,500 thereof. On the same day defendant was allowed 60 days in which to file a bill of exceptions, to which order plaintiffs excepted. It is urged that, in the absence of any rule to the contrary, a bill of exceptions must be filed during the term at which the trial was had. Defendant, having failed to file the bill within the time limited, is not, it is claimed, within the rule which permits the filing thereof where the motion for a new trial has been continued to a subsequent term. The general rule as to the allowance of bills of exceptions is thus stated by Mr. Justice Gray (Bank v. Eldred, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162):

" 'By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or to amend a bill of exceptions already allowed and filed, is at an end. U. S. v. Breitling, 20 How. 252, 15 L. Ed. 900; Muller v. Ehlert, 91 U. S. 249, 23 L. Ed. 319; Jones v. Machine Co., 131 U. S. Append. 150, 24 L. Ed. 925; Hunnicutt v. Petyon, 102 U. S. 333, 26 L. Ed. 113; Davis

v. Patrick, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; Chateaugay Ore & Iron Co. Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508.'

"In cases where a motion for a new trial is regularly filed, and not acted upon, there seems to be no necessity for a presentation of the bill, as the granting of the motion will render it entirely unnecessary so to do. It has been the practice in this circuit to permit the bill to be filed after the motion has been overruled, although such action be had at a subsequent term of court, and we see no reason to depart from this practice in this case. When the motion for a new trial was filed, it was ordered that defendant be granted 'sixty days in which to tender and file a bill of exceptions,' but the purpose of the court to reserve control of the judgment until the motion for a new trial trial should be acted upon is shown in the order withholding execution until further order of the court. At the June term, when the court passed upon the motion, a further time of 60 days was granted to the plaintiff in error within which to file a bill of exceptions. The bill was presented within this time, and we are of the opinion that it was in time, and properly allowed."

In this case it will be observed that the Circuit Court takes full cognizance of the general rule laid down by the Supreme Court in Bank v. Eldred, 143 U. S. 298, and O'Connell v. U. S., supra, and Exporters v. Butterworth-Judson Co., supra.

In Tullis v. Lake Erie & W. R. Co., 105 Fed. 554, the seventh Circuit also approves the rule, and the Court says:

"While it is well settled that a bill of exceptions can be signed only at the term of court at which the trial was had and judgment entered, or within an extension of time then granted (Brooder Co. v. Stahl, 42 C. C. A. 522, 102 Fed. 590), yet if by reason of a motion for a new trial or rehearing or to set aside the judgment, entered at the term, the power of the court over the judgment is retained, a bill of exceptions may be settled or time given for preparing it when the motion is overruled, whether at the same or a later term (Woods v. Linvall, 1 C. C. A. 34, 48 Fed. 73, 4 U. S. App., 45; Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Railroad Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. 497, 28 L. Ed. 492; Smelting Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986; Voorhees v. Manufacturing Co., 151 U. S. 135, 14 Sup. Ct. 295, 38 L. Ed. 101). 'Until then the judgment or decree does not take final effect for the purpose of a writ of error' (Smelting Co. v. Billings); and until then there is no good reason for saying that the time for settling a bill of exceptions, the necessity for which could not be known sooner, had passed. This proposition is not affected by the fact that in the federal courts the ruling upon a motion for a new trial is discretionary, and not reviewable."

In Kentucky Distilleries & Warehouse Co. v. Lilliard, 160 Fed, 34, the Court said:

"The facts on which the motion is made are these: A judgment in favor of the defendants for $7,000 was entered in the usual form on October 4, 1905. On the following day, the court being still in session, the plaintiff entered a motion for a new trial, and the entry on the journal was 'the court not being suffciently advised on said motion takes time.' The court

thereupon assigned the motion for argument on the 3d day of April, 1906. The motion was argued by counsel for both parties at a session of the court at Covington, before the commencement of the next term at Frankfort where this cause was pending. The next term of the court at that place passed without any proceedings in this cause; and nothing further was done until February 27, 1907, when an order was entered denying the motion for a new trial, and giving the plaintiff 60 days within which to prepare and file a bill of exceptions. On the 17th day of April, 1907, a bill of exceptions was presented to the court by the plaintiff and was allowed by the judge, and was filed and ordered to be made a part of the record in the cause. And an entry to that effect was made upon the journal of that day. It is stated by counsel for defendants at the bar that the bill was allowed without any notice of its intended settlement, and in vacation. From the record it would seem, however, that the court was in session when the bill was presented, and, on being allowed by the judge, was ordered to be made part of the record, and the record must control. We do not intend any implication that we think a bill of exceptions may not be settled by the judge in vacation. As to whether notice was given of its intended settlement, or whether counsel for plaintiff was present, the record is silent. Inasmuch as the notice if given would pass from counsel for one party to those of the other, it would not ordinarily appear in the records of the court. No motion was made in the court below for amendment of the bill; nor was any complaint made there, nor is there here, that the bill does not truly and fairly represent the proceedings on the trial of the cause. *The principal ground on which the motion to strike it out is based is that the court lost control over the case upon the lapse of the*

term at which the judgment was entered. This is undoubtedly the rule, if at the expiration of the term the judgment continues final. But if a motion for a new trial has been made or some other relief against the judgment which that court has power to grant has been prayed, and the court, instead of dismissing the motion, holds it for further consideration and disposition at a subsequent term, the judgment is not final, but subject to the further action of the court until the expiration of the term at which the court disposes of the objections made to the judgment. It is sufficient to cite the cases of Merchants' Ins. Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19, a case decided by this court, and the opinion by Judge (now Justice) Day in discussing this subject, and Minahan v. Grand Trunk Western Ry. Co., 138 Fed. 37, 41, 70 C. C. A. 463; citing Ward v. Cochran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195. The motion must be denied."

(Italic ours.)

In Mahoning Valley Ry. Co. v. O'Hara, 196 Fed. 945, the court holds:

"It is well understood, as a primary rule, that exceptions at the trial must be reduced to form and made a part of the record during the term at which judgment is rendered (Muller v. Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319); but it is also settled that the judgment is not finally entered, so as to be beyond the control of the court at a later term, until a pending motion for new trial is denied (Kingman v. Western Mfg. Co., 170 U. S. 675, 678, 18 Sup. Ct. 786, 42 L. Ed. 1192; In re McCall (C. C. A. 6) 145 Fed. 898, 76 C. C. A. 430.) The considerations which lead to this latter result are applicable here. *It would be a vain thing to settle a bill*

> *of exceptions upon a judgment still contingent; and we are clear that the court had full power over this subject during the remainder of the term at which the motion for new trial was decided.* It follows that plaintiff in error is entitled to be heard upon all its assignments."

And this holding is reaffirmed by the Sixth Circuit in Camden Iron Works v. Sater, 223 Fed. 611.

In O. C. Moore Grocery Co. v. Pac. Rice Mills, 296 Fed. 828, (8th Cir.), the verdict was returned and the judgment was entered at the May term of the court. A motion for a new trial was filed during that term. It was overruled at the October term. The bill of exceptions was approved at the October term. The Court said:

> "It has long been the rule in this and other circuits that a bill of exceptions is presented in time if it is presented for allowance at the term at which the motion for a new trial is determined, although that term is subsequent to the term at which the trial was had and the judgment entered, if the motion for a new trial was filed at the trial term and the hearing of it was continued by the court to a subsequent term."

In Slip Scarf Co. v. Wm. Filene's Sons Co., 289 Fed. 641, (First Circuit) the judgment was entered at the September term and motion for a new trial at once made, which was not disposed of till the May term. There was a local rule of court requiring the bill of exceptions to be filed within twenty days, and upon motion to strike the bill of exceptions because not filed within twenty days, the Court said:

> "According to the letter of the rule, a bill of exceptions is to be filed within 20 days after the verdict of the jury. But where a motion for a new trial is interposed, the verdict, as well as any judgment that may have been entered thereon, becomes contingent until the motion has been passed upon and determined. Until then it cannot be known that there is any occasion for filing a bill of exceptions, and, this being so, no good reason can exist for saying that the time for doing so has begun to run or is past. It has been the practice in this circuit, as well as in other circuits, to allow bills of exceptions to be filed within 20 days from the denial of a motion for a new trial and to allow an extension of time for this purpose, if applied for within the twenty days. Merchants' Insurance Co. v. Buckner, 98 Fed. 222, 39 C. C. A. 19; Kentucky Distilleries & Warehouse Co. v. Lillard, 160 Fed. 34, 87 C. C. A. 190; Mahoning Valley Ry. Co. v. O'Hara, 196 Fed. 945, 116 C. C. A. 495; Tullis v. Lake Erie & W. R. Co., 105 Fed. 554, 557, 44 C. C. A. 597."

In U. S. Ship Corp. v. Galveston Dry Dock Co. 13 Fed. (2d) 607, the latest case on the subject, the Fifth Circuit concurs, and the court says:

> "There is no merit in the plaintiff's motion to strike the bill of exceptions, which was signed during the term at which the motion for a new trial was overruled. The time for signing a bill of exceptions and suing out a writ of error did not begin to run until the court acted on the motion for a new trial. Texas Pacific Railway Co. v. Murphy, 111 U. S. 488, 4 S. Ct. 497, 28 L. Ed. 492."

In this case a Writ of Certiorari was denied, (71 L. Ed. 860, 47 Sup. Ct. 237).

To the same effect are:

Missouri, K. & T. Ry. Co. v. Russell, 60 Fed. 501;

United States v. Carr, 61 Fed. 802;

Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 444 (4th Circuit).

If these authorities are correct, and we have found none to the contrary, then the rule is that the court has jurisdiction during the term at which the petition or motion for a new trial is finally disposed of and that the judgment is contingent or conditional until the petition or motion is decided. Applying the rule to the facts in this case, the court having taken the motion for a new trial and to set aside the judgment under advisement, continued to retain jurisdiction of the case, and the mere fact that the term of court ended either by lapse of time or order of adjournment did not divest it of jurisdiction of this case. The judge could still grant or deny the motion, and he denied it. Then for the first time was it certain that there would be any necessity for a bill of exceptions and the time within which to settle the bill began to run, and the court had jurisdiction until a new term began to settle the bill or extend the time. The new trial was denied on July 11, 1929, the May term had adjourned on June 19, 1929, and the next term did not commence until the third Monday in November, 1929. It is our contention that the court had jurisdiction to settle the bill during the remainder of the term and until the November term commenced.

In this connection we call your Honor's attention to Farmers Union Grain Co. v. Hallet & Carey Co. 21 Fed. (2d) 42, (8th Cir.). The case was tried in the District Court of South Dakota, Northern Division. By statute there were two terms a year, on the first Tuesday in May and the second Tuesday in November, (just as there are two terms a year by statute of the District Court of Idaho at Coeur d'Alene in May and November). In 1926, the year in question, the May term began on May 4, the trial was had to the court without a jury on May 8th, and on May 8th the court adjourned sine die, but without deciding the case. The decision of the court was not rendered and the findings and judgment entered until August 17th, about three months before the November term began, and in passing on a motion to strike the bill of exceptions, the court held that the term extended till the November term began, regardless of the order of adjournment sine die prior to the rendering of the judgment. This case, we submit, is squarely analagous to the situation here. In that case the judgment was rendered after the adjournment sine die of the May term and before the commencement of the November term, and in this case the order refusing to vacate the verdict and denying a new trial, which in effect makes the judgment final, was so entered.

If, in the one case the term should be considered to continue until the time limited by law, so should it in the other case. And this is only good common sense, for otherwise a judge who has reserved mat-

ters for consideration, whether judgments in cases already tried to him, or motions for new trial, etc., may through inadvertance adjourn his term, without notice to the parties interested, and summarily and unintentionally cut off their rights. Clearly, as the Eighth Circuit holds, the law will not be given any such strained and unjust interpretation as that.

Counsel is presumed to know the terms of court provided by statute and protect his rights accordingly, but surely one has a right to believe that a judge who has taken a matter under advisement will not divest himself of the power to act by adjourning his term of court before deciding the matters under advisement.

As we understood appellee's argument on his motion to strike the bill of exceptions at the hearing of this case, he did not seriously contend that the court lost jurisdiction prior to the entry of the order denying the motion for a new trial, but placed his reliance on Rule 76 of the local court and the fact that an extension of time was not secured within ten days after the order denying the motion for a new trial was entered.

In this regard we wish to call your Honor's attention to the case of Southern Pac. Co. v. Johnson, 69 Fed. 559, decided by this court by Justice McKenna and Judges Gilbert and Morrow.

In that case Rule 25 of the Circuit Court of Nevada was for all purposes of this argument identical

with Rule 76 of the Idaho Court and required the bill of exceptions to be served on the adverse party within ten days, etc., and this court said:

> "The verdict was returned and judgment entered on June 17, 1893, which was during the March term. The bill of exceptions was not presented for allowance or settlement, nor was the same allowed or settled and certified to, until September 18, 1893,—90 days subsequent to the verdict and entry of judgment. These proceedings were, however, still within the March term of the circuit court for the district of Nevada, the court having but two terms during the year,—one beginning on the third Monday of March, and the other on the first Monday of November. 19 Stat. 4. No orders of court, or stipulations between the parties, extending the time within which to prepare and present the bill of exceptions, appear of record in the transcript. On June 24, 1893,—seven days subsequent to the verdict and judgment,—notice of a motion for a new trial was given by plaintiff in error. This, however, was not disposed of until September 18, 1893, when, as an alternative to the granting of a new trial, the defendant in error consented to a reduction of the verdict from $25,000 to $15,000. According to the rules of the circuit court, above referred to, no further time having been granted by the court, or consented to by the parties, the time within which to file a bill of exceptions expired on June 27, 1893. By the strict terms of these rules, the bill of exceptions would be deemed to have been abandoned, and the right thereto waived. *But adjudications in the supreme court of the United States and in the circuit court of appeals hold that rules of court fixing the time within which bills of exceptions are to be presented, allowed, or settled, and certified to by the trial judge, are*

merely directory. These decisions are to the effect that such rules do not control absolutely the action of the judge; that he is at liberty to depart from their terms, to subserve the ends of justice. U. S. v. Breitling (1857) 20 How. 254; Dredge v. Forsyth (1862) 2 Black, 568; Muller v. Ehlers (1875) 91 U. S. 249; Hunnicutt v. Peyton (1880) 102 U. S. 350; Chateaugay Ore & Iron Co. Petitioner (1888) 128 U. S. 544, 9 Sup. Ct. 150; Hume v. Bowie (1893) 148 U. S. 245, 13 Sup. Ct. 582. Such is the law of this circuit, as declared in the case of Southern Pac. Co. v. Hamilton, 4 C. C. A. 441, 54 Fed. 468, 474. In other words, these rules are regarded as rules of procedure, which may be dispensed with, in the discretion of the judge, provided, always, that the exceptions themselves are seasonably taken and reserved. As was tersely stated by the supreme court in Dredge v. Forsyth, supra:

" 'It is always allowable, if the exceptions be seasonably taken and reserved, that it may be drawn out in form, and sealed by the judge, afterwards; and the time within which it may be so drawn out and presented to the court must depend on the rules and practice of the court, and the judicial discretion of the presiding justice.'

"But it would seem that the exercise of this discretion is limited, under ordinary circumstances, to the same term in which judgement is rendered. Preble v. Bates, 40 Fed. 745. It cannot be done at a subsequent term, except, perhaps under very extraordinary circumstances. See cases cited supra; also, Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450; U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840; Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. 43; Ward v. Cochran, 150 U. S. 597, 602, 14 Sup. Ct. 230; Railway Co. v. Russell, 9 C. C. A. 108,

60 Fed. 501; Miller v. Morgan, 14 C. C. A. 312, 67 Fed. 82. No such objection arises here, however, since the bill of exceptions was settled and certified to within the same term that the verdict and judgment were entered. The trial judge being empowered, according to the weight of authority, with a discretion as to when a bill of exceptions should be settled and certified to (so long as it is within the same term that judgment was entered, and, it would seem, under very extraordinary circumstances, beyond the term at which judgment has been rendered), the question which we are called upon to determine in this case is whether this discretion has been abused. We entertain no doubt that this question should be answered in the negative. There is not the slightest intimation that this discretion has been exercised to the detriment of the substantial rights of the parties. But, aside from the general and inherent power possessed by courts to suspend their own rules, or to except from their provisions a particular case, to subserve the ends of justice, we think that the pendency of the motion for a new trial is a sufficient reason in this case why the action of the trial court in settling and certifying to the bill of exceptions should be sustained. It appears that the bill was settled and certified to on the day the court disposed of the motion for a new trial, viz., on September 18, 1893. The function of a bill of exceptions is to make a record for the appellate court. Black, Law Dict.; Bouv. Law Dict.; Yates v. Smith, 40 Cal. 669. Had the motion for a new trial prevailed, it is obvious that the labor of engrossing, settling, and certifying to the bill of exceptions would have been entirely useless. It was deferred until the motion for a new trial had been disposed of. Whether the mere pendency of a motion for a new trial operates, ipso facto, as an extension

> of time to prepare and have settled a bill of exceptions, it is not necessary to decide, but it was certainly a circumstance proper to be considered by the trial judge in the exercise of his discretion."

The court then goes on to discuss the case of Woods v. Lindvall, supra, and expressly reserves its option as to the effect of the motion for a new trial which is still pending when the term ends.

Since that case was decided, as the above cited cases show, the First, Fourth, Fifth, Sixth, Seventh and Eighth Circuits have all held that it is the term at which the motion for a new trial is determined, rather than the one at which judgment is entered, that governs.

Clearly then the trial judge was within his rights in disregarding the letter of Rule 76 and granting the additional time to settle the bill of exceptions.

Briefly summarized, our contention is that by the great weight of authority the fact that this case was pending on a motion for a new trial when the order was entered on June 19, 1929, adjourning the term sine die, prevented such adjournment from affecting this case and that as to it the term would continue until it expired by statutory lapse of time, and that therefore the trial judge still had jurisdiction to settle the bill of exceptions, and Rule 76 is directory and not mandatory or jurisdictional and that for good cause shown the judge might disregard it. That in this case the trial judge exercised his discretion and the facts surrounding the entry

of the order denying the motion for new trial (Tr. 8) show that he did not abuse his discretion, and that the bill of exceptions was therefore settled and filed on time.

We respectfully submit that the opinion in this case is based on a misunderstanding of the facts, and does not therefore decide in any way the real issue as presented to the court, and to permit it to stand as the final opinion in the case would be to work a substantial injustice on appellant and his counsel, which we feel certain this court did not intend to do.

We submit further that every doubt should be resolved in favor of the defendant and no technicality allowed to stand in the way of a hearing on the merits of this case, involving as it does a heavy fine and long penitentiary sentence for the appellant, and especially since there is no claim on the part of the appellee that the bill of exceptions is not full, true and correct, or that the rights or interests of appellee have in any way been endangered or that any delay has resulted in bringing this case to this court for review.

We therefore respectfully and most earnestly request that this court proceed to dispose of this case on its merits, or grant the appellant a rehearing herein when this question can be more fully presented to the court than was done at the original hear-

ing, which was devoted largely to a hearing on the merits.

Respectfully submitted,
ROBERTSON & PAINE,
Attorneys for Appellant.

I hereby certify that in my judgment the above petition for rehearing is well founded and that it is not interposed for delay.

Attorney for Appellant.